MALAYSIAN RUBBER DEVELOPMENT CORPORATION BERHAD

v.

GLOVE SEAL SDN. BHD.

SUPREME COURT, IPOH
TUN DATO' SERI HAJI ABDUL HAMID BIN HAJI OMAR LP
TAN SRI DATUK EDGAR JOSEPH JR. SCJ.
DATO' MOHAMED DZAIDDIN BIN HAJI ABDULLAH SCJ.
[CIVIL APPEAL NO: 02-231 OF 1993]
28 SEPTEMBER 1994

CONTRACT : Breach of contract - Measure of damages - Consideration of rule in Hadley v. Baxendale - Application of s. 74(1) Contracts Act 1950 - Whether trial Judge was correct in his assessment of damages for loss of profits - Whether trial Judge had applied the correct principles of law - Whether the amount awarded was based on an entirely erroneous estimate of the damage - Whether plaintiff had mitigated its damages.

The appellant/second defendant entered into an agreement dated 1 August 1988 (the said agreement) with the respondent/plaintiff whereby the plaintiff agreed to supply two million pieces of rubber gloves per month to the appellant's principal/first defendant, commencing from November 1988 until October 1989.

The first defendant committed a breach of contract by failing to issue an irrevocable letter of credit in favour of the plaintiff and the plaintiff sued for damages for *inter alia* loss of profits and marketing costs. The plaintiff obtained summary judgment against the second defendant on the issue of liability.

On the assessment of damages, the trial Judge accepted the plaintiff's proposition that as there was no available market for the gloves, the measure of damage was the difference between the contract price and the value of the gloves to the plaintiff at the time of the breach, which value was based on the price at which the gloves were eventually sold. In the premises the trial Judge awarded the plaintiff RM3,102,926.95 as damages for loss of profits and RM108,434.23 as marketing costs.

On appeal the question that arose was whether the learned Judge had misdirected himself with regard to the proper measure of damages for loss of profits and on the question of mitigation of damages.

Held:

[1] The normal measure of damages for breach of contract in this country is prescribed by s. 74(1) of the Contracts Act 1950, which is the statutory enunciation of *Hadley v. Baxendale*. The English equivalent of our s. 74(1) is s. 50(2) of the Sale of Goods Act 1979 which states that if there is clearly no available market, then, consequential loss apart, the damages will be assessed at the contract price less the value of the goods to the plaintiff at the time of the breach, which value is likely to be based upon the price at which the goods are eventually sold.

[2] In arriving at his assessment of the plaintiff's loss of profits where there was no available market for the gloves, the learned Judge had erred in holding that the plaintiff was entitled to purchase the gloves at the time of the breach, instead of manufacturing them. Upon a construction of the said agreement, the plaintiff was obliged to manufacture the 24 million pieces of gloves itself for supply to the first

defendant. This was an important factor in considering the quantum of damages to be awarded, since, upon the evidence, the cost of such manufacture which would have been incurred by the plaintiff, would have exceeded, by far, the cost of purchase.

[3] Generally, the value of the goods to the seller is to be determined at the time of the breach and any relevant evidence may be admissible to prove this value. In the present case it is clear that the learned Judge, following the case of *Harlow and Jones Ltd. v. Panex (International) Ltd.*, determined the value of the 24 million gloves to the plaintiff not at the time or date of the breach, but at the time at which they were eventually sold by the plaintiff.

[4] As there was no satisfactory evidence in the present case that the plaintiff had the first consignment of 2 million gloves ready for shipment by November 1988 and nor was there any evidence that the gloves were not saleable at any realistic price if they were to be sold at the time of the breach or immediately thereafter, it was clear that the facts and circumstances of the present case are different from those in *Harlow and Jones*. In the circumstances, the learned Judge was wrong to follow the principle in *Harlow and Jones* in determining the value of the 24 million gloves.

[5] On the question of mitigation of damages, it is a settled principle that the plaintiff is under a duty to take reasonable steps to mitigate the loss consequent to the defendant's wrong and he will not get damages in respect of any part of the loss which is due to his neglect to take such steps. In the sale of goods, the principle of mitigation is a foundation of the normal rule for the measure of damages which requires the innocent party to act immediately upon the breach. Even in the absence of an available market, the innocent party must act reasonably to mitigate his loss.

[6] Whilst the learned Judge had correctly applied his mind to the statement of principle of Lord Macmillan in *Banco De Portugal v. Waterlow*, that in the law of mitigation of damages the plaintiff is only required to act reasonably, based on the evidence adduced, the learned Judge was wrong to come to the conclusion that the plaintiff had acted reasonably and with justification in mitigating the loss of profits.

[7] On the contrary, it would have been quite reasonable for the plaintiff to have stopped manufacture of the gloves as soon as it became aware of the breach by the first defendant's failure to open the letter of credit. As it was in evidence that the plaintiff was just about to start manufacture of the remaining contracted gloves, it would not have been unreasonable for it to stop further production of the gloves for the subsequent months after the breach. The plaintiff's management should, at that point of time, have made a decision whether to stop further manufacture or to continue to do so.

[8] As the plaintiff was aware that at the time of the breach or some time thereafter, the demand for rubber gloves had deteriorated badly and there was glut in the market, the plaintiff's management must have realised that the costs of continued production of the gloves for supply under the said agreement would be much higher than the receipts it would have got from the sale of the gloves when they were ultimately sold. It would therefore have been more prudent for the plaintiff, in such circumstances and in the ordinary course of business, to stop production of the

gloves in order to save costs, at least until such time as the market improved. In the circumstances, the learned Judge had erred in principle in his assessment of damages for the loss of profits.

[9] In the circumstances of the case, the proper measure of damages is the difference between the contract price and the costs of production of the gloves. That would be the loss which flows directly and naturally from the first defendant's breach. In such a situation, the loss of profits should be the profits which the plaintiff would have made if it had proceeded with the production of the gloves in accordance with the terms of the said agreement.

[10] However, as it would not have been unreasonable for the plaintiff to have stopped production of the gloves after the breach occurred in view of the declining market for gloves at the material time, the loss of profits should be calculated on the assumption that the plaintiff had stopped production of the gloves at the date of the breach. In this regard, the method adopted in Exhibit "D46" affords reliable guidance in quantifying the loss of profits.

[11] However, having regard to the fact that D46 was based on a forecasted production cost, the plaintiff's loss of profits should be more than the RM982,899 stated therein, especially since it would be natural for DW2 (the author of D46) to understate the loss of profits. In the circumstances of the whole case, a fair and reasonable amount for the plaintiff's loss of profits should be RM1,200,000.

[12] The plaintiff had failed to show that the charges for air fares, food and lodging and telephone bills were incurred as a result of the first defendant's breach of the said agreement. As these items have been shown to be unconnected with the plaintiff's business, a sum of RM79,370.76 should be deducted from the award of RM108,434.23 allowed as marketing costs.

[Appeal allowed. Order of High Court substituted. Half costs of appeal to appellant].

[**Bahasa Malaysia** Translation of Headnote]

KONTRAK : Kemungkiran kontrak - Ukuran ganti rugi - Pertimbangan rukun dalam kes Hadley v. Baxendale - Pemakaian s. 74(1) Akta Kontrak 1950 - Sama ada Hakim perbicaraan betul dalam penilaian ganti rugi untuk kerugian keuntungan - Sama ada Hakim perbicaraan telah memakai prinsip-prinsip undang-undang yang betul - Sama ada jumlah yang diawadkan berdasarkan anggaran ganti rugi yang salah - Sama ada plaintif telah mengurangkan ganti ruginya.

Pihak perayu/defendan kedua telah menandatangani satu perjanjian bertarikh 1 Ogos 1988 (perjanjian tersebut) dengan responden/plaintif dimana plaintif bersetuju membekalkan dua juta keping sarung tangan getah sebulan kepada prisipal perayu/defendan pertama mulai dari November 1988 sehingga Oktober 1989.

Defendan pertama telah melakukan satu kemungkiran kontrak dengan gagal membekalkan surat kredit yang tak boleh dibatal kepada plaintif dan plaintif menuntut ganti rugi untuk kerugian keuntungan dan kos pemasaran. Plaintif telah mendapat penghakiman terus terhadap defendan kedua atas isu liabiliti.

Dalam penilaian ganti rugi, Hakim perbicaraan bersetuju dengan proposisi plaintif bahawa memandangkan tiada pasaran bagi sarung tangan tersebut, ukuran ganti rugi adalah perbandingan diantara harga kontrak dan nilai sarung tangan itu

kepada plaintif pada masa kemungkiran kontrak, dimana nilai tersebut berdasarkan harga sebenar sarung tangan itu dijual. Dalam pada itu Hakim perbicaraan mengawadkan plaintif RM3,102,926.95 sebagai ganti rugi untuk kerugian keuntungan dan RM108,434.23 sebagai kos pemasaran.

Dalam rayuan soalan yang timbul ialah sama ada Hakim perbicaraan telah bersalah arahan dirinya dalam perkara ukuran ganti rugi yang betul untuk kerugian keuntungan dan dalam perkara kekurangan ganti rugi.

Diputuskan:

[1] Ukuran ganti rugi bagi kemungkiran kontrak dalam negara ini adalah seperti yang terdapat dalam s. 74(1) Akta Kontrak 1950, yang merupakan penyataan statutori rukun kes *Hadley v. Baxendale*. Seksyen Akta Inggeris yang sama dengan s. 74(1) adalah s. 50(2) Akta Jualan Barang-barang 1979 yang mengatakan bahawa jika ia jelas bahawa tiada pasaran, maka, melainkan kerugian sampingan, ganti rugi akan dinilai dengan mengambil kira perbezaan di antara harga kontrak dengan nilai barangan itu kepada plaintif pada masa kemungkiran, dimana nilai tersebut berdasarkan harga sebenar barangan itu dijual.

[2] Dalam menentukan kerugian keuntungan plaintif dimana tiada pasaran untuk sarung tangan tersebut, Hakim perbicaraan telah tersilap apabila beliau memutuskan bahawa plaintif berhak membeli sarung tangan tersebut pada masa kemungkiran. Dalam merujuk kepada perjanjian tersebut, plaintif adalah berkewajipan mengilang 24 juta keping sarung tangan untuk dibekalakn kepada defendan pertama. Ini merupakan satu faktor penting dalam menilai kuantum ganti rugi kerana, menurut keterangan, kos perkilangan yang akan dialami oleh plaintif adalah jauh lebih tinggi dari kos pembelian.

[3] Pada kebiasaannya nilai barangan kepada seseorang penjual akan ditentukan pada masa kemungkiran dan sebarang keterangan yang relevan boleh digunakan untuk membuktikan nilai ini. Dalam kes ini ia adalah jelas bahawa Hakim perbicaraan telah mengikuti kes *Harlow and Jones Ltd. lwn. Panex (International) Ltd.* untuk mementukan nilai 24 juta sarung tangan getah kepada plaintif bukan pada masa kemungkiran, tetapi pada masa sarung tangan tersebut dijual oleh plaintif.

[4] Memandangkan tiada keterangan yang mencukupi, bahawa plaintif berkemampuan membekalkan konsinemen pertama dua juta sarung tangan pada November 1988, dan bahawa sarung tangan tersebut tidak dapat dijual pada harga yang berpatutan pada masa atau sebaik sahaja kemungkiran berlaku, ia adalah jelas bahawa fakta kes ini adalah berbeza dengan fakta dalam kes *Harlow and Jones*. Dalam keadaan sedemikian, ia adalah salah untuk Hakim perbicaraan mengikuti prinsip dalam kes *Harlow and Jones* untuk menentukan nilai 24 juta sarung tangan tersebut.

[5] Atas persoalan pengurangan ganti rugi, ia adalah menjadi satu prinsip bahawa plaintif berkewajipan mengambil tindakan munasabah untuk mengurangkan kerugian yang berpunca dari kesalahan defendan dan dia tidak akan mendapat ganti rugi untuk sebarang kerugian yang berpunca dari keabaiannya mengambil tindakan tersebut. Dalam penjualan barangan, prinsip kekurangan adalah menjadi asas kepada rukun biasa ukuran ganti rugi yang memerlukan pihak yang tidak

bersalah untuk bertindak serta-merta atas kemungkiran yang berlaku. Pihak yang tidak bersalah mesti bertindak dengan munasabah untuk mengurangkan kerugian, walaupun tidak terdapat pasaran yang nyata.

[6] Sementara Hakim yang bijaksana telah mengambil kira prinsip yang dinyatakan oleh Lord Macmillan dalam kes *Banco De Portugal lwn. Waterlow*, bahawa di bawah undang-undang pengurangan ganti rugi plaintif hanya diperlukan untuk bertindak secara munasabah, berasaskan kepada keterangan yang dikemukakan, Hakim yang bijaksana bersalah atas pendapatnya bahawa plaintif telah bertindak secara munasabah dan berjustifikasi dalam mengurangkan kerugian keuntungan.

[7] Sebaliknya, ia adalah lebih munasabah jikalau plaintif telah menghentikan pengilangan sarung tangan tersebut sebaik sahaja plaintif dapat tahu tentang kemungkiran kontrak oleh kegagalan defendan pertama membuka surat kredit. Daripada keterangan bahawa plaintif baru hendak memulakan pengilangan baki sarung tangan pada masa kemungkiran, ia adalah lebih munasabah untuk menghentikan pengilangan sarung tangan untuk bulan-bulan selepas kemungkiran tersebut. Pihak pengurusan plaintif patut, pada masa itu, membuat satu keputusan sama ada untuk menghentikan atau untuk meneruskan pengilangan.

[8] Oleh kerana plaintif telah dapat tahu, pada masa kemungkiran tersebut, bahawa permintaan untuk sarung tangan getah telah merosot dan bahawa terdapat kebanjiran dalam pasaran, pihak pengurusan plaintif sepatutnya sedar bahawa kos pengilangan sarung tangan tersebut adalah lebih daripada apa yang akan didapat daripada penjualan sarung tangan tersebut pada masa hadapan. Dalam keadan sedemikian ia adalah lebih bijak jikalau plaintif telah menghentikan pengilangan sarung tangan tersebut untuk menjimatkan kos, sekurang-kurangnya sehingga pasaran menjadi bertambah baik. Dalam keadaan sedemikian, Hakim yang bijaksana telah tersilap dalam prinsip menilai ganti rugi bagi kerugian keuntungan.

[9] Dalam keadaan kes ini ukuran ganti rugi yang betul adalah perbezaan diantara harga kontrak dan kos pengilangan sarung tangan tersebut. Itu adalah kerugian yang berpunca secara semulajadi daripada kemungkiran defendan pertama. Dalam keadaan sedemikian, kerugian keuntungan sepatutnya adalah keuntungan yang plaintif akan mendapat sekiranya plaintif meneruskan pengilangan sarung tangan tersebut menurut terma perjanjian tersebut.

[10]Walaubagaimanapun, oleh kerana ia adalah lebih munasabah sekiranya plaintif menghentikan pengilangan sarung tangan tersebut selepas kemungkiran berlaku, berdasarkan pasaran yang berkurangan pada masa itu, kerugian keuntungan sepatutnya dikira atas anggapan bahawa plaintif telah menghentikan pengilangan sarung tangan tersebut pada tarikh kemungkiran. Untuk tujuan ini, cara yang dipakai dalam Eksibit "D46" memberi bimbingan yang boleh diharap dalam menentukan kerugian keuntungan.

[11]Walaubagaimanapun, dengan mengambil kira bahawa D46 adalah berasaskan kos pengilangan yang dijangkakan, kerugian keuntungan plaintif sepatutnya lebih daripada RM982,899 yang dinyatakan dalam D46, lebih-lebih lagi kerana ia adalah satu kebiasaan untuk DW2 (pengarang D46) untuk menaksir kerugian keuntungan. Dalam keadaan keseluruhan kes, kerugian keuntungan plaintif yang patut dan munasabah adalah sejumlah RM1,200,000.

[12] Plaintif telah gagal menunjukkan bahawa bayaran bagi penerbangan, makanan dan penginapan dan bil telefon ditanggung oleh kerana kemungkiran perjanjian tersebut oleh defendant pertama. Oleh kerana ia telah ditunjukkan bahawa butir-butir ini tidak berkaitan dengan perniagaan plaintif, sejumlah RM79,370.76 mesti ditolak daripada awad sejumlah RM108,434.23 yang telah dibenarkan sebagai kos pemasaran.

[Rayuan dibenarkan. Perintah Mahkamah Tinggi diganti. Setengah kos rayuan kepada perayu].

Cases referred to:
Flint v. Lovell [1934] 1 K.B 354 ***(foll)***
Hadley v. Baxendale [1854] 9 Exch. 341 [1854] 9 Exch. 341 ***(refd)***
Toeh Kee Keong v. Tambun Mining Co. Ltd. [1968] 1 MLJ 39 ***(refd)***
Bank Bumiputra Malaysia Bhd. Kuala Trengganu v. Mae Perkayuan Sdn. Bhd. & 4 Ors. [1993] 2 MLJ 76 SC./ [1993] 2 CLJ 495 ***(refd)***
*Assoiated Metal Smelters Ltd v. Tham Cheow Toh . [1971] 1 MLJ 271 (**refd**)*
Harlow and Jones, Ltd v. Panex (International), Ltd . [1967] 2 Lloyd's Report 509 ***(dist)***
Wimble Sons & Co v. Rosenberg [1913] 1 K.B. 279, 282 ***(refd)***
Quinn v. Leathem [1901] A.C 495, 506 ***(refd)***
British Westinghouse Co. v. Underground Ry [1912] AC 673 ***(refd)***
Pasuma Pharmacal Corporation v. McAlister & Co. Ltd [1965] 31 MLJ 221, 227 FC ***(refd)***
Payzu Ltd. v. Saunders [1919] 2 KB 581, 588 ***(refd)***
The Solholt [1983] 1 Llyods Reports 605 C.A ***(refd)***
Banco De Portugal v. Waterlow [1932] AC 452, at 506 ***(dist)***
Tatung Electronic S Pte Ltd v. Binatone International Ltd [1991] 3 MLJ 212 at 215 ***(refd)***
Popular Industries Limited v. Eastern Garment Manufacturing Sdn Bhd [1989] 3 MLJ 360 ***(foll)***

Legislation referred to:
Contracts Act 1950, s. 74(1)
Sales of Goods Act 1979, ss. 74(1) 50(2) (UK)

Other sources referred to:
McGregor on Damages, 15th. Edn., paras 835, 836
Benjamin's Sale of Goods, 4th. Edn., paras 16-068, 16-044

For the appellant - Cecil Abraham; M/s. Shearn Delamore & Company
For the respondents - G. Sri Ram (Fiona Bodipalar with him); M/s. Sri Ram & Company

JUDGMENT

Mohamed Dzaiddin bin Haji Abdullah SCJ:
This is an appeal by the second defendant, now the appellant, against the decision of the High Court Kuala Lumpur given on 11 May 1993 on the award of damages in respect of a breach of contract for the supply and sale of ambidextrous non-sterile latex examination gloves. By a written agreement dated 1 August 1988 (the said agreement) made between the plaintiff and the second defendant as agent for the first defendant, it was agreed that the plaintiff would supply to the first defendant two million pieces of rubber gloves per month commencing from November 1988 to October 1989 for a total purchase price of US$1,848,000. The breach of contract was the failure of the first defendant to issue an irrevocable letter of credit in favour of the plaintiff thirty days before the date of the first shipment of the goods which was to have been on or before 31 October 1988.

As a result of the breach on the part of the first defendant to issue the letter of credit, the plaintiff instituted an action against both defendants on 16 August 1989 claiming damages for a total sum of RM6,155,159 being loss of profits, interest, marketing costs and losses incurred for its 1st and 2nd production lines. On 10 July 1990, the Registrar granted summary judgment on the issue of liability only against the second defendant and an appeal therefrom to the Judge in chambers was dismissed on 28 August 1990. On 5 December 1990, the Supreme Court affirmed the decision of the High Court. In the meanwhile, the Registrar proceeded to hear evidence on the assessment of damages. The hearing concluded on 16 November 1991 without the Registrar delivering any decision as she had resigned from service. The matter was then taken over by the High Court Judge, who on 11 May 1993 awarded the plaintiff damages in the sum of RM3,102,926.95 for loss of profits and RM108,434.23 for marketing costs including interest at 8% p.a. on the total amount from 5 September 1989 until payment, and costs. It is against the assessment of the above heads of damage that this appeal lies.

RM3,102,926.95 for loss of profits

The learned Judge awarded the sum of RM3,102,926.95 for loss of profits based on the plaintiff's proposition that as there was no available market for the gloves, the measure of damage was the difference between the contract price and the value of the gloves to the plaintiff at the time of the breach, which value was based on the price at which the gloves were eventually sold. According to the plaintiff, the amount which it would have received under the said agreement was RM4,904,264.80. However, as a result of the breach, the plaintiff had to sell the 24 million gloves for RM1,801,337.85, thereby incurring a loss of RM3,102,926.95. In accepting the above formula, his Lordship concluded in his grounds of judgment as follows (p. 24 A.R.):

> When a buyer fails or refuses to perform his obligations under a contract for the sale of goods, the seller is ordinarily entitled to the difference between the contract price and the price at which the goods could be sold in an available market, if any. **If there is no available market, then the measure of damages would be the full estimated loss of profit resulting from the breach of the contract:** *Lee Heng & Co. v. Melchers & Co.* [1963] MLJ 47; *Lee Sau Kong v. Leow Cheng Chiang* [1961] MLJ 17; *Harlow and Jones v. Panex (International)* [1967] 2 Ll R. 509. (Emphasis added).

It appears that in coming to his decision on the sum of RM3,102,926.95 being the plaintiff's loss of profits, the learned Judge rejected the second defendant's proposition that the computation should be by reference to the difference between the contract price and the cost of the manufacture of the gloves, the cost of manufacture after the breach being in excess of the resale price. The learned Judge found that the second defendant's proposition was founded on a wrong assumption that the plaintiff was obliged under the said agreement to manufacture these goods itself. According to him, the contract obliged the plaintiff to supply the gloves, but not necessarily to manufacture them.

Therefore, the basic question for our decision here is whether the learned Judge was correct in his assessment of damages for loss of profits. That raises the question whether he applied the correct principles of law or whether the amount was based on an entirely erroneous estimate of the damage. (*Flint v. Lovell*) [1934] 1 KB 354 at 360.

In considering the above question, it is important to bear in mind that the normal measure of damages for breach of contract in this country is prescribed by s. 74(1) of the Contracts Act 1950, which is the statutory enunciation of *Hadley v. Baxendale* [1854] 9 Exch. 341; (*Toeh Kee Keong v. Tambun Mining Co. Ltd.* [1968] 1 MLJ 39; *Bank Bumiputra Malaysia Bhd. Kuala Trengganu v. Mae Perkayuan Sdn. Bhd. & 4 Ors.* [1993] 2 MLJ 76 SC. In essence, the section states that the party may recover any loss or damage for any breach which (a) naturally arose in the usual course of things or (b) which the parties knew, when they made the contract, to be likely to result from the breach of it. For the sake of completeness, it should be mentioned that our Courts have treated the position under the second limb of the section to be similar to the second limb of *Hadley v. Baxendale*, which is, the party may recover damages which may "reasonably be supposed to have been in contemplation of both the parties, of the time they made the contract". See: *Associated Metal Smelters Ltd. v. Tham Cheow Toh* [1971] 1 MLJ 271. The English equivalent to our s. 74(1) is s. 50(2) of the Sale of Goods Act 1979, which was framed in terms of the first rule in *Hadley v. Baxendale* (**Mc Gregor on Damages**, 15th ed. para 835). Thus, s. 50(2) states that the measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract. It there is clearly no available market, then, consequential loss a part, the damages will be assessed at the contract price less the value of the goods to the plaintiff at the time of the breach, which value is likely to be based upon the price at which the goods are eventually sold (*ibid*, para 836). Any relevant evidence may be admissible to prove this value (**Benjamin's Sale of Goods**, 4th ed. para 16-068).

Thus, with the above principles in mind and after considering the record and the written submissions of Counsel, we find the learned Judge had misdirected himself on two fundamental respects with regard to the proper measure of damage of loss of profits. First, in arriving at his assessment of the plaintiff's loss of profits where there was no available market for the gloves, he erred in holding that the plaintiff was entitled to purchase the gloves at the time of the breach, instead of manufacturing them. His Lordship held that under the said agreement the plaintiff was obliged to supply 24 million gloves, but not necessarily to manufacture them itself. With respect, we cannot agree, since upon a construction of the said agreement, the plaintiff was obliged to manufacture these 24 million pieces or gloves itself for supply to the first defendant. Upon examination of the several documents exhibited in Bundle C of the Appeal Record, we are satisfied that the principal activity of the plaintiff when it commenced business operations on 1 November 1988 was that of manufacturing rubber gloves.

It is also clear from the said agreement, under "Quality", the plaintiff was to manufacture these gloves. See also Company's Annual Report and Accounts at 31 December 1988 - p. 755 of Bundle C. In addition, Encik Ramalingam, the plaintiff's Managing Director, (PW1), had testified that the company was incorporated in early 1988 and the first plant for the manufacturing of gloves was set up in July 1988, with the first one million gloves produced in the middle of October 1988. In a letter to the second defendant's marketing manager dated 18 July 1988, PW1 categorically stated that the company would manufacture natural rubber gloves from September 1988 - p. 776. In a further letter of 22 September 1988, it was again stated that the company manufactured non-sterile latex examination gloves with a plant capacity of 15 million gloves per month by March 1989 - p. 779. We have already pointed out that,

contrary to what the learned Judge had held, the plaintiff was contractually bound **not** merely to supply but also to itself manufacture, 24 million pieces of gloves to the first defendant. This was an important factor in considering the quantum of damages to be awarded, since, upon the evidence, the cost of such manufacture which would have been incurred by the plaintiff, would have exceeded, by far, the cost of purchase.

It is trite that the plaintiff must prove the loss although the standard imposed on it is not a high one. Thus, even assuming that the learned Judge was right to conclude that the plaintiff was obliged to supply but not necessarily to manufacture the 24 million gloves, still, we find the evidence was unsatisfactory with regard to the purchases and the resale of these gloves. PW1 testified that the plaintiff bought these gloves between late 1989 and early 1990, but he did not know how much had been paid for them. He added that during that period it was cheaper to buy gloves than to manufacture them. In the same breath, he admitted that the plaintiff had manufactured gloves until about April 1990 when it stopped production. As for the resale, he stated it managed from time to time after the breach to dispose of the 24 million pieces of gloves without formal contracts, but on a "one-off-basis" for the total price of RM1,801,337.85.

This brings us to the question: at which point of time is the value of the goods to the plaintiff (seller) to be determined? Generally, it is determined at the time of the breach and, we would stress, any relevant evidence may be admissible to prove this value. In the present case, it is clear to us that the learned Judge determined the value of the 24 million gloves to the plaintiff not at the time or date of the breach, but at the time at which they were eventually sold by the plaintiff, following the English High Court decision in *Harlow and Jones, Ltd. v. Panex (International) Ltd.* [1967] 2 Lloyd's Reports 509, where Roskill J. held, *inter alia*, that as there was no available market, the measure of damages was that provided in s. 50(2) of the Sale of Goods Act 1893, i.e. difference on 30 September 1966 between contract price of goods and the then value of goods to sellers. The relevant facts of the case were these. A contract was concluded between the plaintiff sellers and defendant buyers for sale of 10,000 tons of Russian steel (f.o.b.) which the sellers were buying from their Russian suppliers. The contract provided for the goods to be delivered during August/ September 1966 in supplier's option, the last date being 30 September 1966. His Lordship stated (at p. 530):

> What is now said is that on 30 September the contract had finally been broken by the defendants, and the plaintiffs had these goods on their hands with the Russian sellers claiming against them and with no market in which to dispose of them. To my mind, the measure of damages is the difference on 30 September between the contract price of the goods and the then value of the goods to the plaintiffs. That is the loss which, in the language of the Act, on the facts on the case, flows directly and naturally from the defendants' breach.
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> .... I have already said there was no market at any material time. I think the plaintiffs were in great difficulty, and I think the difficulties were entirely of the defendants' making. **I have got to put the best value I can upon these goods as at 30 September when the evidence shows they were, for all practical purposes, unsaleable at any realistic price. I have to pay regard to all the relevant factors** and I have done so. **I see no reason for putting their value at that date any higher than the figure at which the 8500 tons were ultimately sold.** [Emphasis added.]

Thus, it is important to stress here that Roskill J., in assessing the value of the 8500 tons of steel not at the date when the contract was broken, i.e. on 30 September, but upon the price at which they were eventually sold, had before, him the evidence, firstly, that the plaintiffs had these goods on their hands on 30 September, and, secondly they were, for all practical purposes, unsaleable at any realistic price. In the circumstances, his Lordship found no reason for putting their value as at 30 September any higher than the figure at which the goods were ultimately sold.

On the other hand, there was no satisfactory evidence in the present case that the plaintiff had the first consignment of two million gloves ready for shipment by November 1988. PW1's evidence was that it would be able to ship the two million gloves by 30 November although it had not made any booking for shipping space. It must be remembered that in f.o.b. contracts, the seller must at his own expense put the goods on board a ship which has to be nominated or designated by the buyer (*Wimble Sons & Co. v. Rosenberg* [1913] 1 KB 279, 282). Secondly, there was no evidence that these gloves were unsaleable at any realistic price if they were to be sold at the time of the breach or immediately thereafter. The plaintiff had only managed to show that there was no available market at the material time or within the fourth quarter of 1988 because the price had dropped considerably. Clearly, the facts and circumstances of the present case are different from *Harlow and Jones*. This leads us to the conclusion that the learned Judge was wrong to follow the principle in *Harlow and Jones* in determining the value of the 24 million gloves not at the time of the breach but upon the price at which they were eventually sold by the plaintiff. Here, we would reiterate that *Harlow and Jones* was decided upon the particular facts and circumstances of that case. A case is only an authority for what it actually decides (*Quinn v. Leathem* [1901] A.C. 495, 506).

The second misdirection relates to the question of mitigation of damages. It is settled principle that the plaintiff is under a duty to take reasonable steps to mitigate the loss consequent to the defendant's wrong and he will not get damages in respect of any part of the loss which is due to his neglect to take such steps (*British Westinghouse Co. v. Underground Ry* [1912] AC 673; *Pasuma Pharmacal Corporation v. McAlister & Co. Ltd.* [1965] 31 MLJ 221, 227 FC). In the sale of goods, the principle of mitigation is a foundation of the normal rule for the measure of damages which requires the innocent party to act immediately upon the breach, to buy or sell in the market, if there is an available market. Even in the absence of an available market, the innocent party must act reasonably to mitigate his loss (**Benjamin's Sale of Goods**, supra, para 16-044). The question what is reasonable or whether the plaintiff has acted reasonably in mitigation of his damages in every case is a question of fact and not law (*Payzu Ltd. v. Saunders* [1919] 2 K.B. 581, 588; *The Solholt* [1983] 1 Llyods Reports 605 CA).

From the evidence adduced on behalf or the plaintiff, it is clear that the plaintiff continued to manufacture the 24 million gloves even after the breach. Ultimately, the company managed to dispose of the whole lot for RM1,801,337.85. Consequently, it closed down the factory in April 1990. In addition, there was the undisputed evidence of PW1 that after the breach and during the fourth quarter of 1988, the market for gloves had deteriorated badly. In 1989 there was a glut of rubber gloves in the market. During that period, many manufacturers had to sell their gloves below the cost of manufacture and it was cheaper to buy than to produce the gloves.

Against the above incontroverted evidence, the learned Judge, however, found that in the circumstances of the case, the plaintiff had acted reasonably in mitigating its loss, adopting the following statement of principle by Lord Macmillan in *Banco De Portugal v. Waterlow* [1932] AC 452, at 506:

> Where the sufferer from a breach of contract finds himself in consequence of that breach placed in a position of embarrassment the measures which he may be driven to adopt in order to extricate himself ought not to be weighed in nice scales at the instance of the party whose breach of contract has occasioned the difficulty. It is often easy after an emergency has passed to criticize the steps which have been taken to meet it, but such criticism does not come well from those who have themselves created the emergency. The law is satisfied if the party placed in a difficult situation by reason of the breach of a duty owed to him has acted reasonably in the adoption of remedial measures, and he will not be held disentitled to recover the cost of such measures merely because the party in breach can suggest that other measures less burdensome to him might have been taken.

In *Banco De Portugal*, a firm of printers employed by the Bank of Portugal to print a series of bank notes, known as Vasco da Gama 500 escudo notes delivered to the Bank 600,000 notes which were put into circulation in Portugal. Subsequently, in breach of their contract of employment, the printers delivered to one M., the head of a band of criminals, 580,000 notes of the same type, printed from the original plates or from plates made from the same die, in the belief that he had the authority of the bank. M and his associates introduced these false notes into Portugal and put a large number of them into circulation. The bank on discovering that unauthorized notes were in circulation issued notices withdrawing the whole of this issue of Vasco da Gama notes and undertaking, within a limited time, to exchange all notes of this type presented to the Bank for other notes. The bank had an exclusive licence to issue bank notes as legal tender in Portugal, but the amount of the notes to be issued was controlled by law. At all material times the currency was inconvertible. In an action by the bank against the printers for breach or contract, the defendants maintained (1) that the loss suffered by the bank was due to their own voluntary action in paying the unauthorized notes; (2) that the loss to the bank was limited to the cost of printing and paper in regard to the new issue. The House of Lords, in holding that the loss arose naturally from the breach of contract, stated per Lord Macmillan (at p. 505):

> The Bank in my view was justified in taking immediate action when it did, for the fact of the existence in the currency of a large number of spurious notes became a matter of public knowledge almost simultaneously with its discovery by the bank, and if a panic was to be averted it was essential to take action at once. I equally think that having properly announced the withdrawal of the notes and its intention to honour all such notes in the hands of the public, it was not possible for the bank to alter its policy until a reasonable time had been given to the public to effect the exchange. To have honoured the spurious notes so long as it could not tell them from the genuine notes and then to cease to honour them when it acquired the means of discrimination would have created a second panic and such a course of conduct on the part of the bank would have been grossly unfair. If the only way to avoid a panic was to honour good and bad notes alike, as I think in the circumstances it was, the bank's ability to distinguish between them becomes an irrelevant consideration.
>
> Moreover the bank was quite unable to say with regard to any particular spurious note presented to it whether it had not itself unwittingly reissued it into circulation and so become responsible for it.

> In my opinion the action of the bank in honouring all notes of the type in question, genuine and spurious alike, between December 7 and December 26, 1925, was reasonable and justifiable in the circumstances, and Messrs. Waterlow ought to be held responsible for whatever loss was occasioned to the bank by the adoption of that policy.

It must be appreciated that the "emergency" which Lord Macmillan was talking about obviously related to the peculiar facts and circumstances of that case. Again, in our view, that case is totally distinguishable from the facts and circumstances of the present case. Here, there was no question of the plaintiff being placed in a position of embarrassment or an "emergency". There was ample time, upon realising the occurrence of the breach, for the plaintiff to reconsider whether or not, in the light of low price for rubber gloves at the material time, the management should continue or cease manufacture in order to save costs. There was no evidence of any panic in the market as a result of the glut. On the contrary, according to PW1, many manufacturers had sold their supply below the costs of manufacturing. Whilst we appreciate that the learned Judge had correctly applied his mind to the statement of principle of Lord Macmillan that in the law of mitigation of damages, the plaintiff is only required to act reasonably, we are, on the other hand, of the view that, based on the evidence which we have highlighted above, the learned Judge was wrong to come to the conclusion that the plaintiff had acted reasonably and with justification in mitigating the loss of profits.

On the contrary, we find it was quite reasonable for the plaintiff to have stopped manufacture of the gloves as soon as it became aware of the breach by the first defendant's failure to open the letter of credit. It must be remembered that under the said agreement, the plaintiff was required to manufacture two million pieces of gloves per month beginning from November 1988. It was also in evidence that the plaintiff was just about to start manufacture of the remaining contracted gloves. It would not, therefore, be unreasonable for it to stop further production of the gloves for the subsequent months after the breach. In our view, the plaintiff's management should at that point of time have made a decision whether to stop further manufacture or to continue to do so.

Secondly, the plaintiff was aware that at the time of the breach or some time thereafter, the demand for rubber gloves had deteriorated badly and there was a glut in the market. In such circumstances, the plaintiff's management must have realised that the cost of continued production of the gloves for supply under the said agreement, which at that point of time had come to an end, would be much higher than the receipts it would have got from the sales of the gloves when they were ultimately sold. Hence, would be not be prudent for the plaintiff, in such circumstances and in the ordinary course of business, to stop production of the gloves in order to save costs, at least until such time when the market improved?

For reasons stated, in our judgment, the learned Judge had erred in principle in his assessment of damages for the loss of profits. As stated by Greer LJ in *Flint v. Lovell, supra*:

> I think it right to say that this Court will be disinclined to reverse the finding of a trial judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a lesser sum. In order to justify reversing the trial judge on the question of the amount of damages it will generally be

necessary **that this Court should be convinced either that the judge acted upon some wrong principle of law,** or that the amount awarded was so extremely high or so very small as to make it, in the judgement of this Court, **an entirely erroneous estimate of the damage to which the plaintiff is entitled.** [Emphasis added].

In our opinion, in the circumstances of the case, the proper measure of damages is the difference between the contract price and the costs of production of these gloves. That would be the loss which flows directly and naturally from the first defendant's breach. In such a situation, the loss of profits should be the profits that the plaintiff would have made if it had proceeded with the production of the gloves in accordance with the terms of the said agreement. However, having regard to our observation earlier that it would not be unreasonable for the plaintiff to stop production of the gloves after the breach occurred, in view of the declining market for gloves at the material time, the loss of profits should therefore be calculated on the assumption that the plaintiff had stopped production of the gloves at the date of the breach. In this regard, we would accept the method adopted in exhibit D 46 as a reasonable way of assessing the loss of profits. According to Encik Yong Boon Sik, the second defendant's accountant (DW2), he worked out the contract sales value and deducted the production cost, but since there was no actual production cost because the contract was not performed, he used the forecasted production cost from October 1988 to November 1989. So the forecast of profit for 1989 came to RM1,067,983 and for October to December 1988 there was a forecast of loss of RM350,213. Therefore, the net forecasted profit if the plaintiff had stopped production would be RM717,770. DW2 then added RM210,512 and RM54,617 being stop production cost over 12 months and restart production cost respectively, which the plaintiff was entitled to, being the consequential loss arising from the stoppage and restarting of production. In *Tatung Electronics (S) Pte Ltd. v. Binatone International Ltd.* [1991] 3 MLJ 212 at 215, the Singapore Court of Appeal stated:

> The law is clear: where, as a result of a defendant's breach of contract, a plaintiff takes steps to mitigate and incurs reasonable expenses, the plaintiff may recover damages to indemnify him in respect of these expenses. The mere fact that the defendant was unaware of the specific nature of the expense incurred would not affect his liability to indemnify the plaintiff.

Therefore, based on D46, had the plaintiff stopped production of the gloves at the time of the breach, the loss of profits should be RM982,899.

We note that the computation in D46 by DW2 was called into question because in the first place he was not an expert as he was never involved in the business of manufacturing rubber gloves and secondly D46 was based on a forecasted production cost. It was therefore suggested by Counsel for the plaintiff that there was no probative value in D46. Having accepted the formula that the proper measure of damage in this case to be the difference between the contract price and the cost of production, we find D46 affords reliable guidance to us in quantifying the loss of profit. However, having regard to the fact that D46 was based on a forecasted production cost, we feel the plaintiffs loss of profits should be more than RM982,899, especially since it would be natural for DW2 to understate the loss of profits. In the circumstances of the whole case, a fair and reasonable amount for the plaintiff's loss of profits should be RM1,200,000.

Marketing costs of RM108,434.23

The learned Judge awarded the above amount being marketing costs to compensate the plaintiff for incurring expenses in marketing their gloves which would otherwise have been supplied to the first defendant under the contract. However, how this amount was arrived at was not elaborated by his Lordship in the grounds of judgment. From the record, it would appear that he accepted its the plaintiff's marketing costs schedule, P21AC, which showed the breakdown of the expenses purportedly incurred by the plaintiff company in respect of air travels to market these gloves; courier, postage, telephone, facsimile and forwarding charges; and claims for food and lodging incurred by the plaintiff"s staff whilst travelling in connection with its marketing of the gloves. According to Encik Cecil Abraham, the plaintiff had failed to show that these costs were linked to the appellant's breach . Counsel submitted that the claim of RM38,552 for air fares were for trips unconnected with the said agreement. They were made before the said agreement had been breached by the first defendant. Moreover, these trips were made by Mr. Ramalingam on behalf of MRY Associates and not for the plaintiff. With regard to the telephone charges, Counsel contended that the plaintiff had not clearly shown whether they were telephone calls made relating to the appellants breach.

For this head of damages, the plaintiff was entitled to claim for such amount as it could prove to be clearly attributable to the first defendant's breach of the said agreement. In this regard we would approve what was stated in *Popular Industries Limited v. Estern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360 (at p. 367):

> It is axiomatic that a plaintiff seeking substantial damages has the burden of proving both the fact and the amount of damages before he can recover. If he proves neither, the action will fail or he may be awarded only nominal damages upon proof of the contravention of a right. Thus nominal damages may be awarded in all cases of breach of contract (see *Marzetti v Willam* 109 ER 842). And, where damage is shown but its amount is not proved sufficiently or at all, the court will usually decree nominal damages. See, for example *Dixon v Deveridge* (1825) 2 C&P 109; 172 ER 50 and *Twyman v Knowles* (138 ER 1183).

From the invoices, we are satisfied that the amount of RM38,552 for air tickets were for trips made to the United States and United Kingdom which were not only unconnected with the said agreement, but also for trips made to secure the alternative sales of the plaintiff's gloves before the breach of the said agreement occurred. According to PWl's evidence, the first marketing trip was made about a week after the said agreement was signed for the purpose of getting a better feel of the market and to look for additional markets for the company's second line. He admitted that the claim for marketing trips was included as damages because when the appellant reneged on the said agreement, the plaintiff had sold the gloves to some of the customers they met during the marketing trips. PW1 also agreed that when he made the marketing trips in August 1988, there was no breach of the said agreement. As for MRY Associates, PW1 did admit that it was his own company and that it had no connection with the plaintiff. In addition, there was a claim for food and lodging in connection with these trips in the sum of RM32,480.34.

On the claim of RM8,338.42 for telephone charges, PW2 was unable to show how these calls were attributed to the plaintiff. Some of the telephone charges came from the telephone of its marketing executive. He was quite honest to admit that he was

unable to say whether the telephone charges were for calls related to the breach of the said agreement.

As the above three items have been shown to be unconnected with the plaintiff's business, a sum of RM79,370.76 should be deducted from the award of RM108,434.23 as the plaintiff had failed to show that the charges for air fares, food and lodging and telephone bills were incurred as a result of the first defendant's breach of the said agreement. Accordingly, we substitute the marketing costs of RM108,434.23 with the sum of RM29,063.47.

We therefore allow this appeal by setting aside the order of the High Court dated 11 May 1993 and substitute an order that the appellant do pay to the plaintiff the following sum as damages:

1. RM1,200,000 for loss of profits;
2. RM29,063 47 for marketing costs;
3. Interest at 8% per annum from the date of the writ until full satisfaction;
4. Half costs of this appeal to the appellant.